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NO. 71-1633

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

WALTER L. LARSEN, JR.,

Petitioner,

vs.

AIR CALIFORNIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT

OPINIONS OF THE COURTS BELOW

In a decision filed on March 2, 1972 and not yet officially reported, the United States Court of Appeals for the Ninth Circuit affirmed the holding of the United States District Court for the Central District of California in favor of respondent [see Appendix, pp. 1 & 2]. A petition for rehear-

ing was denied, without further opinion, on April 13, 1972. The decision of the District Court, which also included Findings of Fact and Conclusions of Law, is reported at 313 F. Supp. 218 (1970) [see Appendix, pp. 2 - 15].

JURISDICTION

The judgment of the District Court was dated May 12, 1970 and entered May 19, 1970 [see Appendix, pp. 14 & 15]. The judgment of the Court of Appeals was entered on March 2, 1972 [see Appendix pp. 1 & 2] and the order denying rehearing was filed April 3, 1972. The sole issue before the trial court under petitioner's First Amended Complaint was whether or not respondent had violated the provisions of 50 U.S.C. App. § 459 (g) (4), of the Military Selective Service Act of 1967. Jurisdiction of the case is based upon 50 U.S.C. App. § 459 (d) and 28 U.S.C. § 1331.

QUESTION PRESENTED FOR REVIEW

1. Whether or not an issue of law remains to be decided by this Court and whether or not this Court should review the Findings of Fact and Conclusions of Law that were determined by the District Court and upheld by the Court of Appeals.

STATUTE INVOLVED

50 U.S.C. App. § 459 (g) (4), in pertinent part, is as follows:

"Any employee . . . shall upon request be grant-

ed a leave of absence by his employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon his release from a period of such active duty for training or inactive duty training . . . such employee shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes."

STATEMENT OF CASE

This action was filed by petitioner on May 15, 1969. The original complaint contained six alleged causes of action. On the motion of the respondent, the complaint was dismissed with prejudice and without leave to amend except as to petitioner's claim predicated upon 50 U.S.C. App. § 459 (g) (4) and 50 U.S.C. App. § 459 (c) (3). The petitioner does not claim that such dismissal constituted error. The case proceeded to trial on the sole issue of whether respondent violated the rights of petitioner under 50 U.S.C. App. § 459 (g) (4).

Respondent is a passenger air carrier operating scheduled service between northern and southern California. Petitioner submitted an employment application on August 8, 1967 for a position as a co-pilot. Petitioner's employment application was accepted by respondent, and petitioner commenced employment effective September 16, 1967. (Rec.[1] 121.) Petitioner's employment application had been

[1] As used herein "Rec." refers to the Clerk's Record and "Tr." refers to the Reporter's Transcript.

intentionally falsified, but this fact was not discovered until after petitioner's termination. (Tr. 716.)

Prior to September 16, 1967, petitioner and other new pilot employees attended a pre-employment interview with respondent's chief pilot (Tr. 57), vice-president of operations (Tr. 58, 87), and chief dispatcher (Tr. 140). At this meeting petitioner informed respondent, for the first time, that he was a member of the Coast Guard Reserve and that he would be required to attend Coast Guard drills one week end a month.

Petitioner was well aware that respondent's heaviest passenger traffic was on the week ends (Tr. 114), and to alleviate the potential conflict of employee duties and reserve drills, petitioner suggested that he would trip trade (i.e., exchange his week-end duties for respondent with another co-pilot employed by respondent) and thus be available for week-end duties once a month for the Coast Guard Reserve. (Tr. 60, 118-119, 636-640.)

Petitioner commenced performing regular employment as a co-pilot on October 25, 1967, was furloughed by respondent on November 16, 1967 for reasons not germane to the present action (Rec. 121), and was recalled from furlough on March 8, 1968. (Rec. 122.)

After petitioner's return from furlough, and prior to the posting of respondent's flight schedule for the week end of April 20 and 21, 1968, petitioner submitted to respondent's chief dispatcher a piece of paper apparently setting forth the April drill dates to be April 20 and 21, 1968. (Tr. 548.) The exact form and content of the paper is not clear, as the paper was never offered into evidence.

Petitioner later learned that he had been scheduled for flight duties for respondent on the same week end as his

April military drills, and trip traded with another co-pilot, so that he could be present for his Coast Guard Reserve duties. (Tr. 549, Plaintiff's Exhibit 6.) There is no evidence and petitioner does not contend that he was treated any differently than any other co-pilot with respect to week-end duty, the crew assignments being on a rotational basis. (Tr. 132, 146-147.) It is also uncontroverted that during petitioner's employment, there were other employees of the respondent who were both reservists and flight crew members, and none of these employees experienced difficulties in accommodating drill obligations to week-end flight schedules (Finding of Fact No. 5, Appendix p. 10; see, *e.g.*, Tr. 99, 110-112, 114, 141-142, 283, 285, 288, 456, 512, 770).

Petitioner's drills for the month of May, 1968, were scheduled for the week end of May 4 and 5. A few days prior to the drill dates, petitioner submitted a note to the respondent's dispatcher with the dates of the May drills, but later learned that he was scheduled for flight duties with respondent on May 4 and 5. (Tr. 551.)

On May 3, 1968, the day before his military training commitment, a conference between respondent's president, Mr. Benscoter, and petitioner was held at the request of the petitioner in Mr. Benscoter's office. The conference was initiated by petitioner pursuant to a letter sent by respondent's president to all employees, encouraging discussions between respondent's employees and the chief executive officer (Tr. 555). At this meeting petitioner stated that he was having difficulty with his week-end scheduling and indicated his intention of submitting requests for leaves of absence for military drills (Tr. 555-556). Respondent's presi-

dent agreed that such a procedure "might be the thing to do" and that he would look into the matter (Tr. 556). Petitioner trip traded with another co-pilot so that he could attend his May 4 drills, but he did not attend his May 5 drills (Tr. 560).

On May 21, 1968, petitioner submitted to the office of respondent's chief pilot a request for leave of absence on a form provided by the Navy (Rec. 124, Tr. 561). This is the first memorandum of any kind relating to military drills submitted to respondent's chief pilot by petitioner (Tr. 414). Respondent granted the request for leave of absence, and petitioner performed his military drills on leave of absence for the week end of June 1 and 2, 1968. Petitioner returned to his regular employment duties on June 3, 1968 (Rec. 124), and on June 4, 1968 respondent gave petitioner notice of termination effective June 20, 1968 (Rec. 124, Plaintiff's Exhibit 24, Tr. 276-277).

Petitioner contends that the notes submitted prior to the April and May 1968 drills constituted requests for leaves of absence under the provisions of 50 U.S.C. App. § 459 (g) (4). Respondent contends, and the trial court found, that petitioner's first actual request for leave of absence was the request of May 21, 1968, which request was granted by respondent (Conclusion of Law No. 2, Appendix p. 12; Tr. 196-197).

On April 27, 1968, approximately five weeks before petitioner's termination, respondent instituted a procedure described in a document entitled "Discipline and Discharge Hearing Program" which was mailed to all of respondent's employees, including the petitioner (Plaintiff's Exhibit 21; Finding of Fact No. 14, Appendix p. 11). Although the procedure was not intended to apply to flight crew members, who theretofore had

chosen a union to represent the pilots for collective bargaining purposes, the document was inadvertently mailed to flight crew employees (Rec. 122).

By virtue of petitioner's receipt of a copy of the program and the absence of any formal rescission thereof, the trial court found that on June 10, 1968, petitioner submitted a timely request for hearing in an attempt to initiate the hearing procedure set forth in the "Discipline and Discharge Hearing Program." In response, respondent gave notice that petitioner would not be granted a hearing. (Findings of Fact Nos. 16 and 17, Appendix pp. 11 & 12).

The trial court further found that by denying petitioner a hearing under the proffered program, the respondent did not restore the petitioner to his position with the same "status" as he had had prior to his military drills of June 1 and 2, 1968 (Conclusions of Law Nos. 3, 4, 5 and 8, Appendix pp. 12 & 13), and, thus, the reduction in petitioner's "status" caused by such denial was in violation of 50 U.S.C. App. § 459 (g) (4).

The trial court awarded the petitioner monetary damages, utilizing two bases upon which to compute an identical award. The first method of computation was based on petitioner's salary on the date of his termination ($750 per month) for the period between the date of termination and the time within which a hearing with respect to petitioner's discharge would have been concluded under the "Discipline and Discharge Hearing Program" (Exhibit 21, Rec. 200 and 209). The other computation was founded on petitioner's salary for the period between the date of discharge and the time of the declination by the United States Attorney's office to represent him in the within action, less the amount petitioner would have received as salary had he mitigated his damages

during the interim period (Rec. 200 - 201, Tr. 854). (See Appendix pp. 8 & 9.)

The trial court declined to order reinstatement of the petitioner by respondent for two principal reasons. First, the trial court found that petitioner was terminated by respondent for good faith and for cause (Finding of Fact No. 20, Appendix p. 12). Petitioner's termination arose out of the detrimental effect of petitioner's attitude and general personality upon his fellow employees (Finding of Fact No. 11, Appendix p. 11); his unsatisfactory technical performance of flight duties (Findings of Fact Nos. 9 and 12, Appendix p. 11); and, particularly, his falling asleep while at the controls of a commercial passenger flight on April 23, 1968 (Finding of Fact No. 10, Appendix p. 11).

Secondly, the trial court found that petitioner had falsified his employment application, and had petitioner not falsified the application, not only would respondent not have employed petitioner in the first instance but respondent would not have voluntarily re-employed petitioner (Conclusion of Law No. 10, Appendix pp. 13 & 14; Findings of Fact Nos. 18 and 19, Appendix p. 12; see also Tr. 766).

The United States Court of Appeals for the Ninth Circuit, in affirming the judgment of the lower court in its entirety, stated, *inter alia,* that the respondent lost his job for unsatisfactory performance as a flight crew member and not because he requested leave to attend week-end drills for the Coast Guard Reserve (Appendix p. 1).

ARGUMENT

I

This Court Should Not Grant Petitioner's Petition For Writ Of Certiorari To Consider Those Findings Of Fact Already Determined By The District Court And Upheld By The Court Of Appeals.

Apparently, the petitioner is again challenging the sufficiency of the evidence to sustain Findings of Fact Nos. 4, 9, 10, 11, 12, 18, 19, 20 and 22, as well as Conclusions of Law Nos. 2, 6, 9 and 10. The challenged Findings concern themselves with the following fundamental issues:

(1) Whether petitioner requested leaves of absence for military drill activities in April and May within the meaning of 50 U.S.C. App. § 459 (g) (4);

(2) Whether petitioner was discharged in good faith and for cause;

(3) Whether petitioner's employment records before being hired by respondent, coupled with the petitioner's falsification of his application for employment and subsequent employment performance for respondent, constituted sufficient grounds to deny petitioner's claim for re-employment; and

(4) Whether or not petitioner mitigated his damages after denial by respondent of reinstatement of petitioner's status under 50 U.S.C. App. § 459 (g) (4).

Petitioner has asked that this Court issue a Writ of Cer-

tiorari to review the District Court's Findings of Fact, all of which were accepted by the Court of Appeals, on his theory that those Findings were improperly decided by the District Court. Petitioner argues at page eight of his petition that the Facts are still controverted inasmuch as the Court of Appeals stated that "[t]he evidence was in sharp conflict on all material issues" (Appendix p. 1). What petitioner fails to recognize is that the Court of Appeals unequivocally affirmed the Findings of Fact and Conclusions of Law of the District Court.

With regard to those issues of fact again raised by the petitioner, this Court has stated that it will 'not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *A fortiori* the petitioner concedes in his petition that "this Court does not grant certiorari to correct errors in fact findings."

This Court has adopted a "two court" rule which is directly applicable to petitioner's brief and cuts against this Court's granting certiorari to review Findings of Fact. In the case of *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635, 636 (1967), the Court succinctly states the rule:

> "The petitioner asks us to reject as 'clearly erroneous' the *factual* conclusion about his Party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent Findings of Fact by two courts below in the absence of *a very obvious*

> *and exceptional showing of error.' E.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S. Ct. 535, 538, 93 L. Ed. 672. . . . The policy underlying the *'two court' rule* is obvious. *This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues.* When, as here, resolution of the disputed factual issue turns largely on an assessment on the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force." (Emphasis added.)

Of course, every rule has an exception. The *Berenyi* Court, at 636, states as follows:

> "To be sure, this Court has not hesitated to undertake independent examination of factual issues where *constitutional claims* may depend on their resolution." (Emphasis added.)

Thus, the "two court" rule has some elasticity when an important claim is presented. What, then, are exceptions to the "two court" rule? This Court has granted certiorari when it appears that a petitioner's due process rights may have been disturbed [*e.g., Thompson v. City of Louisville*, 362 U.S. 199 (1960)] or where there has been a coerced confession caused by third degree police methods in criminal proceedings [*e.g., Chambers v. Florida*, 309 U.S. 227 (1940); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944)] or when there was a denial of counsel in a criminal case [*e.g., Hawk v. Olson*, 326 U.S. 271 (1945); *Hudson v. North Carolina*, 363 U.S. 697 (1960)] or in the event that the petitioner's first amendment rights had been violated [*e.g., Jacobellis v. Ohio*, 378 U.S.

184 (1964)] or when the lower court either withholds the case from the jury or sets aside the jury's verdict [e.g., Wilkerson v. McCarthy, 336 U.S. 53 (1949)].

In all of the above examples, a serious constitutional issue has been presented. A constitutional issue has not been advanced by petitioner herein, and it is submitted that the "two court" rule should not be circumvented absent the requisite showing.

Petitioner challenges those Findings of Fact with respect to the cause for petitioner's discharge and the motives of respondent's management with respect thereto. (Petitioner's brief, pp. 8-12.) The pivotal issue of fact around which all other issues of fact revolve was aptly pronounced by the Court of Appeals:

> "The crucial issue was whether petitioner lost his job for requesting leave to attend military reserve drills or for unsatisfactory performance as a flight-crew member." (Appendix p. 1.)

During the course of the trial, the trier of fact had ample opportunity to evaluate the witnesses and the credibility of their testimony concerning petitioner's employment with respondent and the reasons for his termination. Ten employees of respondent, including petitioner's fellow flight crew members, testified at the trial. After due consideration of the testimony, as well as the demeanor of the petitioner and the credibility of other witnesses, the trial court concluded that the evidence substantially supported a finding that the petitioner's discharge was in good faith and without reference to his reserve training obligations.

At trial, the trial judge, on more than one occasion commented specifically on his observations of the demeanor

and credibility of the petitioner as compared to other witnesses (Tr. 790, 842 - 844). For example, there was evidence presented concerning the issue of whether or not petitioner had been sleeping while at the controls of one of respondent's aircraft on a regularly scheduled passenger flight (Finding of Fact No. 10, Appendix p. 11 [see also Appendix p. 6]; Tr. 385). Although the plaintiff testified that he had, at most, experienced a sense of "drowsiness" while at the controls, the only two percipient witnesses, the captain and the flight engineer, testified that petitioner was, in fact, asleep at the controls (see, e.g., Tr. 154, 160-162, 171 - 173, 281 - 282, 384, 387, 495 - 496). It was also uncontradicted that the petitioner's dozing was reported to the respondent's chief pilot both in writing and orally (Tr. 336, 388 - 389, 400 - 401). It was testified that this incident was a major factor in causing petitioner's termination (Tr. 281, 425).

From the foregoing example, it is clear that the trial court believed the testimony of the pilot and the flight engineer and not the petitioner. Other Findings of Fact concerning the cause for petitioner's discharge were similarly based on petitioner's demeanor and credibility when compared to other witnesses heard by the trial judge.[2]

This Court has held that where issues of motive or intent are presented, the trial judge's conclusion as to the demeanor and credibility of the witnesses is crucial and should be respected both on appeal to the Court of Appeals and ultimately before this Court on a petition for certiorari. As was stated by Justice Jackson in *United States v. Yellow Cab Co.*, 338 U.S. 338, 94 L. Ed. 150 (1949) (on direct appeal):

[2]See, *infra*, Argument II C., pp. 19 - 23.

> "Findings as to the design, motive and intent with which men act depend particularly upon the credit given to witnesses by those who see and hear them. If defendant's witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who made the records from which the Government would draw an inference of guilt and conceded that they bear a different meaning from that which the Government contends." (338 U.S. at 341 - 342.)

The petitioner failed to convince the Court of Appeals that the findings of the District Court had been "clearly erroneous." As has been said:

> "The burden on appellant who seeks to reverse a judgment for error in fact to show that essential findings are clearly erroneous is, indeed, a heavy one when, as in this instance, the decision must turn largely upon the credibility of the witnesses the trial judge saw and heard testify."
>
> *Hedger v. Reynolds*, 216 F.2d 202 (2d Cir. 1954).

It is submitted that in view of the record, this Court should reassert the "two court" rule and affirm the "clearly erroneous" test which the Court of Appeals was bound to follow in deciding against petitioner. Federal Rules of Civil Procedure § 52(a) (28 U.S.C.A.); Smith v. James Irvine Foundation, 401 F.2d 772 (9th Cir. 1968); *see also Stacher v. United States*, 258 F.2d 112 (9th Cir. 1958).

By failing to meet the "clearly erroneous" test of the Court of Appeals, an issue of fact does not remain to be reviewed by this Court, and petitioner's Petition for Writ of

Certiorari should be denied.

II

This Court Should Not Grant Petitioner's Petition For Writ Of Certiorari To Consider Those Conclusions Of Law Already Determined By The District Court And Upheld By The Court Of Appeals.

A. Introduction.

Throughout his petition, petitioner states that this Court is purportedly presented with "troublesome" issues under 50 U.S.C. App. § 459 (g) (4), pertinent portions of which have been set forth at pages 2 and 3, *supra*.

Although petitioner does not expressly so state, it is apparent that he contends that a Writ of Certiorari should be granted pursuant to Rule 19 (1) (b) (28 U.S.C. App.), which states that a Writ of Certiorari may be granted:

> *"[Where the Court of Appeals] has decided an important question of federal law which has not been, but should be, settled by [the Supreme Court] . . ."*

The petitioner also asks for a Writ of Certiorari to correct the erroneous findings of the lower courts or, in the alternative, that this Court sidestep the "clearly erroneous" test in determining whether or not to grant certiorari. (Petitioner's brief, pp. 12, 13, 14.)

The record clearly indicated the propriety of the decision below. Yet, even assuming that the case was wrongfully decided by the trial court, it has been stated many times that this Court is not primarily concerned with lower court

errors. For example, quoting Mr. Justice Harlan:

> "The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari, nor, for that matter is the fact a case may have been rightly decided in itself enough to preclude certiorari."
>
> Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 551 (1958).

Commenting on an error in the decision below as a basis for the granting of certiorari, it has been said:

> "The Court's aim . . . is to resolve the conflicts among the lower courts and to determine questions of importance. It is then the function of the lower court to apply the principles established by the Supreme Court to the great mass of cases. The Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence, the Court generally will not grant certiorari just because the decision below may be erroneous.
>
> Robert L. Stern, Eugene Gressman, *Supreme Court Practice*, Fourth Edition, 178 (1969).

Although petitioner feels that the facts and law have been improperly decided, the evidence clearly shows that the provisions of 50 U.S.C. App. § 459 (g) have practical applicability and that it was petitioner's lack of performance that caused his termination and not military discrimination

prohibited by 50 U.S.C. App. § 459 (g) (4). Indeed, while petitioner was in the employment of respondent, there were other crew members employed by respondent who were also engaged in week-end military drill activities. As to these flight crew employees, none encountered difficulties with the respondent with respect to accommodating their drill obligations to their week-end flight schedules (Finding of Fact No. 5, Appendix p. 10; see, *e.g.*, Tr. 99, 110 - 112, 114, 141 - 142, 283, 285, 288, 456, 512, 770). Obviously, then, no unusual problems in application and enforcement of 50 U.S.C. App. § 459 (g) (4) exist as has been claimed by petitioner (Petitioner's brief, pp. 5 - 6).

Moreover, the case at bar does not present an important question of federal law first considered by this Court. It is true that certiorari has been granted to review an important question of first impression under a statute. *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964). In the case at bar, however, petitioner has merely asked this Court to review the evidence and pass on the District Court's Findings of Fact and Conclusions of Law. In sum, the petitioner does not raise an important federal question, he only asks that this Court take a third look at the evidence in his case.

B. The lower court findings with respect to respondent's obligations and petitioner's rights under 50 U.S.C. App. § 459 (g) (4) are not in error.

Under the terms of 50 U.S.C. App. § 459 (g) (4) a violation of the statute is established if the employer: (a) fails, upon request, to grant a leave of absence to the employee for

the period required to perform training duty, or (b) the employer fails to permit the employee to return to his position with the same seniority, status, pay and vacation that the employee would have had had he not been absent for such duty.

Petitioner contends that respondent violated the statute by denying him leaves of absence under 50 U.S.C. App. § 459 (g) (4) for training duty in the months of April and May, 1968 (Petitioner's brief, pp. 5, 6) despite Conclusion of Law No. 2 (Appendix p. 12) of the District Court to the contrary. The only evidence in the record with respect to petitioner's requesting a leave of absence for his April and May training duties is that petitioner handed to respondent's dispatcher a "note" apparently indicating the prospective drill dates (Tr. 551, 691 - 692).

Petitioner's own testimony shows that he, himself, considered his first actual request for a leave of absence to have been submitted to respondent's chief pilot on May 21, 1968 (Tr. 561, 695). Further, petitioner testified that it was not until he had been scheduled for employment duties coincident with his May military training drills that he concluded that he should request leaves of absence from respondent (Tr. 554). Lastly, petitioner concedes that pursuant to this request, a leave of absence was granted, and he performed military drill duties on the scheduled dates (Rec. 124). Based on petitioner's own testimony, and the circumstances under which such notes were submitted, the trial court had ample evidence upon which it could conclude that the notes did not constitute requests for leaves of absence within the meaning of 50 U.S.C. App. § 459 (g) (4).

C. The trial court had justification to find that petitioner was not entitled to reinstatement to his position of employment.

Petitioner argues that certain discharge cases under the National Labor Relations Act [*National Labor Relations Board v. Great Dane Trailers, Inc.*, 396 F.2d 769 (5th Cir. 1968), and *National Labor Relations Board v. Plant City Steel Corp.*, 331 F.2d 511 (5th Cir. 1964)] should be applied to the case at bar. (Petitioner's brief, pp. 14, 15). These cases are clearly distinguishable from the case at bar, since the discharges in both cases cited by petitioner were found by the court to be discriminatory in nature. In the instant case, both the District Court and the Court of Appeals found that the discharge of the petitioner was not based on discrimination of any kind, but was for cause, and that as a result of this finding, the petitioner should not be entitled to reinstatement.

The trial court based its conclusion that the petitioner was not entitled to reinstatement on two factual premises: First, petitioner's unsatisfactory job performance while employed by respondent; and, second, the fact that petitioner had intentionally omitted from his original employment application those references of previous employers with whom petitioner had an unsatisfactory record of employment –knowledge of which, by respondent, would have precluded petitioner from being accepted for employment by respondent in the first instance (Findings of Fact Nos. 13 and 18, Appendix pp. 11 & 12; Conclusions of Law Nos. 6 and 10, Appendix pp. 13 & 14; see also Tr. 732, 766).

Despite petitioner's arguments, the evidence is clear and

convincing not only that petitioner on one occasion slept while at the controls of a passenger aircraft[3] but that prior to his termination oral and written reports which reflected negatively on petitioner's technical performance had been submitted to petitioner's supervisors by petitioner's fellow employees (see, *e.g.*, Tr. 150, 152, 170 - 171, 279, 194 - 196, 412 - 415, 416 - 417, 442 - 446). In each instance, such written reports, whether before or after petitioner's termination, were supported by oral reports given prior to the time petitioner was terminated (Tr. 478 - 479).

In addition, there was testimony from petitioner's fellow flight crew members that during his employment petitioner did not respond to criticism or instruction (Finding of Fact No. 12, Appendix p. 11; Tr. 184, 197, 217, 220 - 221, 280, 421, 423, 435, 439, 441 - 442). The record is similarly replete with testimony that petitioner's attitude and personality had an unsettling and disturbing effect on his fellow employees, resulting in oral and written reports being made to respondent. Such reports, combined with other considerations, caused the final decision to terminate petitioner from his employment (Finding of Fact No. 11, Appendix p. 11; see also, *e.g.*, petitioner's Exhibits 10, 12, 13, 15, 17, 28, and 29, and respondent's Exhibit D; Tr. 98, 105, 129, 200 - 201, 206 - 207, 280, 392 - 394, 414 - 415, 449, 455, 465, 476 - 477, 510 - 512). Quite clearly, albeit petitioner's protestations to the contrary, the petitioner was not discharged because of his military drill obligations (see also Tr. 279 -298, 756, 768 - 774).

Petitioner's performance while employed by respondent caused his termination. At no time has respondent advanced the fact of petitioner's falsification of his employment appli-

[3]See, *supra*, Argument I, p. 13.

cation as a justification for his termination. As a matter of fact, the falsification was not discovered by respondent's management until after petitioner's termination. Likewise, respondent has at no time contended that the difficulties encountered by petitioner with employers prior to respondent contributed in any way to its decision to terminate (see, *e.g.*, Tr. 717 - 718, 736).

The evidence of petitioner's prior employment record, including petitioner's falsification of his employment application, was received by the trial court solely for impeachment purposes and on the issue of the appropriateness of the court ordering re-employment (Tr. 612 - 613). The relevancy of petitioner's unsatisfactory performance with prior employers to the issue of re-employment is clear, especially where such evidence indicated deficiencies in attitude and technical performance virtually identical to those experienced by petitioner while employed by respondent (see, *e.g.*, Tr. 616, 619, 622, 635, 625 - 627, 721 - 723, 765 - 766). The testimony of respondent's vice-president of operations was unequivocally to the effect that had he known of the circumstances of petitioner's past employment, petitioner would not have been employed by respondent in the first instance, or, if he had been employed, he would have been terminated on the basis of such information (Tr. 766).

The history of the Selective Service Act of 1967, both legislative and judicial, is devoid of so much as a suggestion that those who employ military reservists are thereby precluded from exercising reasonable judgment as to the suitability of these employees. In short, there is nothing in 50 U.S.C. App. § 459 (g) (4) which compels an employer or this Court to disregard the normal employer-employee

relationship.

In a case similar to the one at bar, *Green v. Tho-Ro Products*, 232 F.2d 172 (3d Cir. 1956), the plaintiff sued for re-employment under 50 U.S.C. App. § 459. The Third Circuit affirmed the trial court's judgment in favor of the defendant-employer, adopting the reasoning of the lower court that because plaintiff's position required harmonious relations and mutual trust with other employees, his habit of annoying such other employees made it unreasonable for the defendant to be asked to restore the plaintiff to his original position. (232 F.2d at 174.)

In another analogous case, *Trusteed Funds, Inc. v. Dacey*, 160 F.2d 413 (1st Cir. 1947), the plaintiff was a returning serviceman who brought an action for re-employment under the Selective Training and Service Act of 1940 (54 Stat. 890). The Court of Appeals did not agree with the trial court that the plaintiff's conduct before he left for military service was not at issue and reversed and remanded the matter so that the plaintiff's past performance could be placed in evidence on the issue of re-employment. The lower court found as follows:

> "It would be unreasonable to require the defendant to reinstate the plaintiff, in view of his hostility to the officers and directors of the company, and his inability to work with them in a relationship of trust and confidence."
>
> *Dacey v. Trusteed Funds, Inc.*, 72 F. Supp. 611, 613 (D.C. Mass. 1947).

See also *Barisoff v. Hollywood Baseball Association*, 71 F. Supp. 493 (S.D. Cal. 1948), *aff'd*, 166 F.2d 1023 (9th Cir. 1948).

The reasoning of the *Dacey* and *Tho-Ro* cases has equal application under the circumstances of the present matter. As was stated in *Ferris v. Alaska Airways*, 113 F. Supp. 907 (Alaska 1953):

> "Keeping in mind that the industry here in question is an airline, that defendant's aircraft fly over a relatively dangerous and difficult route, and *that human life rests in the hands of the pilot, the court is of the opinion that personality flaws may well justify termination of employment where it affects the willingness to fly, the morale, and the alertness of pilot personnel.*" (Emphasis added.) (113 F. Supp. at 909.)

On the record before this Court, it is respectfully submitted that the findings of the trial court, as upheld by the Court of Appeals, concerning the causes for petitioner's termination and the issue of re-employment, are unimpeachable and that petitioner's Petition for Writ of Certiorari should be denied.

D. Both the District Court and the Court of Appeals properly found that petitioner's failure to adequately seek and obtain comparable employment after his discharge from respondent's employ was a failure to properly mitigate damages.

The Court of Appeals refused to disturb the findings of the District Court with respect to damages. In *Sanders v. Leach*, 158 F.2d 486 (5th Cir. 1946), the court stated the test at the appellate level:

> " . . . it is not our duty to determine whether,

> if we were triers, we would have awarded damages in the same or a less amount. It is our duty to determine only whether we can say that the amount awarded was so inadequate that it was clearly erroneous, that is, unjust." (158 F.2d at 488.)

(See Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C.A. following Section 723c.)

In support of the trial court's findings (Finding of Fact No. 22, Appendix p. 12; Conclusion of Law No. 9, Appendix p. 13), the record is clear that between the effective date of petitioner's termination of June 20, 1968 and the date of the commencement of trial on February 17, 1970, petitioner was not employed by any person or entity and did not receive any income whatsoever from any employment other than his military drill activities (Tr. 589 - 595). While petitioner described himself as a self-employed inventor (Tr. 589 - 590), his testimony indicated that he considered his present occupation to be the prosecution of the within lawsuit.

Petitioner's attempt to obtain new employment is well documented. His first contact with a prospective employer occurred approximately six months subsequent to his termination by respondent. His other efforts were typified by his response to a newspaper advertisement requesting pilots having qualifications other than those held by petitioner (Tr. 601 - 603). Petitioner testified that he had not, since his termination by respondent, contacted any of the well-known locally-based air carriers, such as Pacific Southwest Airlines and Flying Tigers Airlines (see, *e.g.*, Tr. 605 - 607; see also Tr. 795 - 796).

It has been held in the case of *Levine v. Beman*, 178 F.2d 440 (7th Cir. 1949), that the award of damages is

discretionary with the trial court. The question of the correct measure of damages is one in which the federal courts follow state law. 1A Moores Federal Practice 0.310; *Meissner v. Papas*, 35 F. Supp. 676 (E.D. Wisc. 1940). Further, it is well recognized that an employee who claims past wages as damages resulting from an employment discharge must mitigate such damages by actively seeking and obtaining comparable employment elsewhere. *Smetherham v. Laundry Workers' Union*, 44 Cal. App. 2d 131 (1941); *Gregg v. McDonald*, 73 Cal. App. 748 (1948); *Utter v. Chapman*, 38 Cal. 560 (1869). Under the law and evidence it is clear that the trial court properly found that petitioner failed to mitigate damages resulting from his discharge.

III

This Court Should Not Grant Petitioner's Petition For Writ Of Certiorari Based On Its Powers Of Supervision.

The petitioner's brief half-heartedly urges that this Court should exercise its power of supervision and grant petitioner's Petition for Writ of Certiorari, to avoid what petitioner believes were adverse rulings in both the District Court and the Court of Appeals. (Petitioner's brief, p. 18.)

Due to the variety of situations in which this Court's powers of supervision have been invoked, it is difficult to construct a definition of supervisory power which is comprehensive and accurate. Summarized, supervisory power has been exercised to formulate new rules of general application as well as to enforce judicial compliance with already existing standards of fairness. The sole common denominator of the

usage of the power of supervision is a strong desire on the part of this Court to maintain and develop standards of fair play in the federal court system which are more exacting than the minimum constitutional requirements of due process.

Recently, supervisory power has been used to overrule a trial judge's exercise of discretion where it has produced injustice, although not a technical abuse of discretion was committed. Thus, in *Marshal v. United States*, 36 U.S. 310, 313 (1959), the Supreme Court overruled a trial judge's refusal to grant the petitioner's motion for a new trial after several members of the jury had admitted reading prejudicial newspaper articles about the petitioner. The *Marshal* case suggests that the power of supervision is inherent in the Supreme Court and that its availability as a basis of decision may avoid unjust results in those cases where a just result cannot otherwise be reached through the application of already existing legal doctrine.

The Court's supervisory power has been invoked to treat a transcript, not technically part of the record on appeal, as part of the record before it (*Mortensen v. United States*, 322 U.S. 369 (1944)). It has been used to relax or even dispense with procedural requirements where strict adherence to the rules of procedure might produce a miscarriage of justice (*Helwig v. United States*, 162 F.2d 837 (6th Cir. 1947)). Supervisory powers have been exercised to order a new trial before another judge when a trial judge has engaged in unbecoming judicial behavior (*Offutt v. United States*, 348 U.S. 11 (1954)). Such supervisory powers have been invoked to correct a defect in the lower court's method of jury selection (*Thiel v.*

Southern Pacific Company, 328 U.S. 217 (1946)) and supervisory power will be sometimes utilized in a "tainted evidence" situation (*Mesarosh v. United States*, 352 U.S. 1 (1956)).

From the foregoing it is clear that the power of supervision has been invoked in the areas of the law that are discretionary and where considerable leeway is presented to relax both doctrine and procedure in extraordinary cases. Moreover, the power of supervision is also often exercised to prevent or correct injustice where existing procedures have proved inadequate.

The petitioner herein argues that, in effect, an act of injustice has been perpetrated on him by both the District Court and the Court of Appeals. The petitioner does not argue that he did not receive a fair trial and appeal, or that the system of court review was inadequate, only that both courts incorrectly stood behind the Findings of Fact and Conclusions of Law of the District Court. The case at bar does not come anywhere near the importance of those cases cited above. It is submitted that in all instances, the powers of supervision were never used for the sole purpose of reviewing the Findings of Fact and Conclusions of Law of the District Court but for some higher and more important purpose. The supervisory power should not be used merely because petitioner exclaims that this case is one of first impression to be presented before this Court. With respect to petitioner's case at bar, it is clear that all of the material issues of fact and law now presented to this Court have already been heard and correctly decided by both the District Court and the Court of Appeals and that an act of injustice by the lower courts has not taken place.

CONCLUSION

Both the District Court and the Court of Appeals have concluded that the evidence sustained the judgment. The evidence is overwhelming that petitioner was discharged for cause and not because he was a member of the Coast Guard Reserve. Moreover, the evidence clearly shows that petitioner was disallowed reinstatement because of his unsatisfactory job performance, his prior employment record, and his intentional falsification of his employment application.

The petitioner has asked this Court nothing more than to review the Findings of Fact and Conclusions of Law of both the District Court and the Court of Appeals. No new issues have been presented.

The District Court had every opportunity to observe the demeanor and credibility of all of the witnesses and believed the respondent. It is submitted that this Court should adhere to its "two court" rule and not set aside the Findings of Fact and Conclusions of Law of the lower court.

For the reasons stated herein, petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BROWNELL MERRELL, JR. of

DIETSCH, GATES, MORRIS & MERRELL

Attorney for Respondent

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APPENDIX

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

No. 26372.

WALTER L. LARSEN, JR., Appellant, v. AIR CALIFORNIA, Appellee.

[Filed March 2, 1972]

Appeal from the United States District Court for the Central District of California

Before: KOELSCH, TRASK, and GOODWIN, Circuit Judges.

PER CURIAM:

Plaintiff, a discharged commercial airline copilot, brought action under 50 U.S.C. App. § 459(g)(4), and 50 U.S.C. App. § 459(c) (3) (Veterans' Re-employment Rights), demanding reinstatement and back pay. He appeals a judgment granting partial back pay but denying reinstatement.

The crucial issue was whether plaintiff lost his job for requesting leave to attend military reserve drills or for unsatisfactory perfromance as a flight-crew member. The evidence was in sharp conflict on all material issues. The district judge observed the witnesses, heard and weighed the evidence, and made findings of fact adverse to the plaintiff. The record reveals no basis for disturbing those findings. Fed. R. Civ. P. 52(a).

While the trial court found no factual basis for ordering reinstatement, the court did find the defendant employer

delinquent under 50 U.S.C. App. § 459(g)(4) in failing to afford plaintiff a predischarge hearing pursuant to the defendant's own personnel-policy manual. The court accordingly awarded damages of $2,500 for wages lost during the time necessary for the hearing to which plaintiff was entitled. The defendant has not cross-appealed.

Affirmed.

†

DECISION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

In the United States District Court for the Central District of California.

Civil Action No. 69-944-AAH.

WALTER L. LARSEN, JR., Plaintiff, vs. AIR CALIFORNIA, Defendant.

[Lodged April 30, 1970
Filed May 12, 1970]

Walter L. Larsen, Jr., Plaintiff *in propria persona.*

Brownell Merrell, Jr. and J. Randolph Huston, Gates, Morris, Merrell & Stephens, Los Angeles, California, for Defendant Air California.

Decision

I

This action proceeded to trial on February 17, 1970 on Plaintiff's First Amended Complaint in which the Plaintiff alleged that the Defendant, his prior employer, had

violated the provisions of 50 U.S.C. App. § 459(g) (4) of the Selective Service Act of 1967. The Plaintiff seeks re-employment and reimbursement of back wages from the date of his discharge by Defendant. Jurisdiction in the case is based upon 50 U.S.C. App. § 459(d) and 28 U.S.C. § 1331 relating to the disposition of federal questions.

II

The Defendant herein is a regularly scheduled commercial airline transporting passengers within the State of California. Plaintiff was first employed by the Defendant in September 1967 as a co-pilot. For reasons unrelated to the case at bar, he was furloughed by the Defendant in November 1967 and recalled to work in March 1968. On June 4, 1968, Defendant notified the Plaintiff that he had been discharged with his termination to be effective on June 20, 1968.

Plaintiff's original Complaint in this action was filed on May 15, 1969, approximately one year after the Plaintiff had been discharged by the Defendant. This original Complaint contained claims for relief based on (a) Defamation; (b) Breach of Contract; (c) Sections 394 and 394.5 of the California Military and Veterans Code; (d) 42 U.S.C. § 1985; (e) 50 U.S.C. App. § 459(c) (3); and (f) 50 U.S.C. App. § 459 (g) (4). All but the last of the foregoing bases of liability were dismissed by the Court as failing to constitute claims upon which relief could be granted and the action proceeded to trial upon the sole question of whether the Defendant had violated the provisions of Section 459 (g) (4) of the Selective Service Act of 1967.

III

During the period of his employment with Defendant, the Plaintiff was actively engaged in reserve training as an

officer in United States Coast Guard Reserve. He had completed an extended tour of active duty with the Coast Guard in 1962 and has since continued his military training on a voluntary basis. His Reserve duties required him to attend at least one week end of training drills per month. Plaintiff's First Amended Complaint alleges that the Defendant denied him leave of absence for attendance at his Reserve drills for the months of April and May, 1968, and that the Defendant did not properly restore him to his job after granting him a leave of absence for drills conducted on June 1 and 2 of 1968, all in violation of Section 459(g) (4) of the Selective Service Act of 1967. This statute reads, in pertinent part, as follows:

> "Any employee . . . shall upon request be granted a leave of absence by his employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon his release from a period of such active duty for training or inactive duty training . . . such employee shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes."

The Plaintiff's allegations as to the April and May Reserve drills are without merit.[1] Plaintiff's testimony at the trial suggested that the "little scraps of paper" on which he had written his drill dates for April and May and had given to the Defendant's Chief Dispatcher were not consid-

[1] The evidence disclosed that the Plaintiff actually attended both of his scheduled drill dates in April, 1968 and missed one day of drills in May 1968.

ered by the Plaintiff at the time to be requests for leave of absence from his employment duties nor could the Defendant reasonably have viewed them as such. The Plaintiff testified that in early May, 1968, he first decided to request leaves of absence from the Defendant and told the Defendant's President of this intention at a meeting with him on May 3, 1968. In addition, the testimony of both the Defendant's management personnel and that of the Plaintiff himself indicated that the Plaintiff was at all times aware of potential conflicts between his Reserve duties and his employment with an airline that carried the bulk of its passenger traffic on its week-end flights, and was afforded an opportunity to accommodate his drill schedule to his employment schedule. Plaintiff's testimony also revealed that he had missed only two days of Reserve drills during his employment with Defendant and that he had been able to make up at least one of these drills at a later date. It was not until May 1968 that Plaintiff submitted a formal request for a leave of absence for his Reserve drills on June 1 and 2 and this request was granted by the Defendant.

The Plaintiff's case thus revolves around the circumstances surrounding his return to work after attending the drills on June 1 and June 2, 1968. The Plaintiff's Complaint admits that he returned to the service of Air California on June 3, 1968 and the records of the Defendant indicate that he participated in routine flight duties on that date. It was on June 4, 1968, as a cumulative result of various reports received by Defendant's management revealing substandard performance by the Plaintiff, that the Defendant's Chief Pilot terminated the Plaintiff effective June 20, 1968.

There was substantial evidence presented at the trial to

support the conclusion that the Plaintiff's discharge was effected in good faith and without reference to his Reserve training obligations. The evidence in this respect reflected adversely on the Plaintiff's technical ability, his ability to respond to criticism and instruction, and revealed a general demeanor marked by observable personality traits incompatible with flight-crew duty. Numerous written reports from other employees of the Defendant were introduced which indicated a generally deficient performance by Plaintiff in the discharge of his duties. Two witnesses at the trial testified that the Defendant [*sic*] had on one occasion fallen asleep or "dozed" while at the controls of an Air California passenger flight. None of the testimony or other evidence submitted supports the Plaintiff's contention that this evidence was amassed as a subterfuge to justify Plaintiff's termination and to deny him his rights under the Selective Service Act of 1967. In the face of such overriding evidence, Section 459(g) (4) can hardly be interpreted as entitling one to a lifetime job. The scheme of Federal re-employment rights statutes does not require a court to disregard those aspects of the basic employment relationship which would make continued or renewed employment unreasonable. *Green v. Tho-Ro Products, Inc.*, 232 F.2d 172 (3rd Cir. 1956); *Dacey v. Trusteed Funds, Inc.*, 72 F. Supp. 611 (D.C. Mass. 1947).

This conclusion is buttressed by evidence revealing that the Plaintiff had intentionally omitted from his August 8, 1967 employment application with Defendant reference to two prior employers, one of which had discharged the Plaintiff after five weeks of employment. In fact, Plaintiff's employment record with his prior employers reveals a continuing pattern of difficulties and deficiencies similar, if not

identical, to those which arose during the Plaintiff's employment by Air California. In view of the foregoing and in view of the substantial reasons existing for the Plaintiff's discharge, it would be unreasonable and inequitable to require the Defendant to restore the Plaintiff to his position of employment.

IV

On April 27, 1968, some five weeks prior to Plaintiff's discharge, the Defendant instituted by means of a letter sent to all of its employees a Discipline and Discharge Hearing Program. Although the Plaintiff did receive a copy of the Discipline and Discharge Hearing Program, the Defendant contended at the trial that the Program had not been intended to apply to the company's crew-member employees who had at that time already participated in the election of a collective bargaining agent. The Defendant also contended that the Discharge Program was not intended to apply to probationary employees and that it considered the probationary period for its flight-crew employees to be one year, which was generally accepted in the industry. Such an intention, however, was not explicit either in the Program itself or in the cover letter which was distributed with it. Nor was there any indication that the Program was subsequently revoked as to Defendant's crew-member employees. The institution of this Program and its distribution to the various employees of the Defendant created a contractual relationship between the employer and its employees and, until revoked, could be justifiably relied upon by its recipients.

The Plaintiff made timely application for a hearing under the Program by submitting a grievance letter to the Defendant on June 10, 1968. The Defendant refused a hearing to the Plaintiff on the grounds that the Discipline and Discharge

Hearing Program did not apply to flight-crew members such as the Plaintiff. This denial was in violation of Section 459 (g) (4) of the Selective Service Act of 1967 insofar as that section requires an employer to return a veteran who has been engaged in reserve activities to his position of employment with the same "status" which he enjoyed prior to his training period. Accordingly, although Defendant's discharge of the Plaintiff was warranted and supported by good cause and although there is no evidence to suggest that such a hearing would have resulted in reinstatement, the company's refusal to grant him a hearing under the Discipline and Discharge Hearing Program was both a reduction in the "status" of his position and a breach of their implied contractual obligation to the Plaintiff which had arisen with the dissemination of the Program.

V

In view of these facts, the Plaintiff is entitled to be compensated for lost wages between the final date on which the Plaintiff was informed by the Defendant company that it would not grant him a discharge hearing, June 17, 1968, and the day on which such a hearing, if it had been conducted, would have concluded.[2] Such a period amounts to 94 days and accordingly the Plaintiff, who was then receiving a salary of $750.00 per month, is entitled to damages in the amount of $2,250.00.

Evidence was introduced at the trial concerning the Plaintiff's activity after his discharge by Defendant. From

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[2]The Discharge Hearing procedure contained maximum time limits for the various stages of the hearing. These periods totaled 34 days. The final written decision in such matters is required to be made "as soon as practicable" and the Court is of the opinion that would reasonably have been 60 days. The total period is thus deemed to be 94 days.

the date of his discharge in June of 1968 to the date of the trial herein, which commenced on February 17, 1970, Plaintiff received no income from employment whatsoever other than the military pay which he received for his attendance at Coast Guard Reserve drills. Although the Plaintiff testified that he had engaged in "invention development" at his place of residence, this work had generated no income for the Plaintiff and Plaintiff's own testimony conceded that the substantial portion of his time had gone into the preparation for and prosecution of this action against the Defendant. There was likewise insufficient evidence upon which to conclude that the Plaintiff had sought other employment with sufficient diligence to conclude that he had adequately attempted to mitigate any damages resulting from his discharge.

As an alternative finding to support the award of damages in the amount of $2,250.00 to Plaintiff, the Plaintiff may be entitled to the sum of $750.00 per month for the period from the date of his discharge until January 30, 1969, the date on which Plaintiff was informed by the United States Attorney's office that it had reviewed his case against Defendant and concluded that its merits did not warrant their representation, such representation being discretionary under Section 459(d) of the Selective Service Act. After a review of the Plaintiff's complete employment history and the various salaries which he had received, it is this Court's opinion that the Plaintiff would have received a minimum salary of $450.00 had he successfully mitigated his damages. Subtracting this sum from $750.00 per month for the aforementioned period of time, one arrives at the net figure of $300.00 per month or a total of $2,250.00.

In accordance with the foregoing, which shall also constitute findings of fact and conclusions of law, the Court now makes its formal Findings of Fact and Conclusions of Law.

Findings of Fact

1. The Plaintiff entered into the employ of Defendant on September 16, 1968 and thereafter adequately completed the training program of Defendant, Air California.

2. Defendant is a commercial airline specializing in commuter service between northern and southern California and whose heaviest passenger traffic occurs on week ends.

3. In September 1967, prior to the commencement of Plaintiff's duties with Defendant, Plaintiff and members of Defendant's management conducted a "pre-employment interview". At this meeting, Plaintiff informed Defendant for the first time of his Coast Guard Reserve training obligations and the Plaintiff himself suggested that he might "trip-trade" his assigned crew-duty obligations with other of Defendant's co-pilots in order to accommodate his drill schedule with that of the airline's flight schedule.

4. Plaintiff was at all times afforded an opportunity to "trip-trade" in order to meet his reserve duties.

5. During the course of Plaintiff's employ with Defendant, Air California had at least two other crew-member employees active in Reserve training programs who successfully employed "trip-trading" as a means of accommodating both their employment and their military obligations.

6. Plaintiff submitted to Defendant's management a formal written request for leave of absence from employment duties on June 1 and June 2, 1968.

7. Defendant granted Plaintiff's request for leave of

absence on June 1 and 2, 1968, and Plaintiff engaged in military reserve training on these dates.

8. Plaintiff returned to the employ of Defendant on June 3, 1968 and engaged in normal employment duties.

9. Prior to Plaintiff's discharge, oral and written reports were submitted to Defendant's management reflecting negatively upon the quality of the Plaintiff's performance for Defendant.

10. On an Air California passenger flight in April of 1968, Plaintiff was "dozing" or "sleeping" while at the controls of an Air California passenger flight.

11. Defendant's management received oral and written communications from its other employees concerning the fact that Plaintiff's attitude and personality created a disturbing effect upon his fellow crew-members on and off the flight deck.

12. During his employ with Defendant, Plaintiff did not respond constructively to criticism and instruction offered with respect to his technical competence.

13. Plaintiff, in his August 8, 1967 application for employment with Defendant, failed to answer completely a question regarding past employment and, in fact, intentionally deleted reference to his past employment with two commercial airlines, one of which had discharged Plaintiff after five weeks of employment.

14. On or about April 27, 1968, the Defendant instituted a Discipline and Discharge Hearing Program and mailed a copy of this Program to the Plaintiff.

15. On June 4, 1968, Defendant gave Plaintiff written notice of his termination which was to be effective June 20, 1968.

16. On June 10, 1968, the Plaintiff submitted a timely

"grievance letter" to Defendant, thus attempting to initiate the discharge hearing procedure set forth in the Air California Discipline and Discharge Hearing Program.

17. On June 17, 1968, Defendant gave Plaintiff formal notice that he would not be granted a discharge hearing pursuant to the company's Program.

18. The difficulties which the Plaintiff realized while in the employ of the Defendant are similar to problems which the Plaintiff encountered with his prior employers.

19. Plaintiff would not have been employed by Defendant if Defendant had known about Plaintiff's past employment which Plaintiff had omitted from his employment application.

20. The Plaintiff was terminated by Defendant in good faith and for cause.

21. At the time of his discharge by Defendant, Plaintiff was earning the sum of $750 per month.

22. Subsequent to his discharge by Defendant, Plaintiff has retained no income producing employment and failed to diligently seek out such employment.

Conclusions of Law

1. The Court has jurisdiction in this matter and the parties hereto by reason of Section 9(d) of the Military Selective Service Act of 1967; 50 U.S.C. App. § 459(d) and 28 U.S.C. 1331 relating to the disposition of Federal questions.

2. The notes given by the Plaintiff to Defendant's Chief Dispatcher concerning his April and May Reserve drills did not constitute requests for leave of absence within the meaning of 50 U.S.C. § 459(g) (4).

3. The Plaintiff justifiably relied upon the promulgation and distribution to him of Defendant's Discipline and

Discharge Hearing Program and was thus entitled to the process and procedures contained therein.

4. Section 459(g) (4) of the Selective Service Act of 1967 requires that employers, having granted leaves of absence to reservist employees, return such employees after their training to their positions with the same "status" as the reservist enjoyed prior to engaging in the military drill.

5. Defendant's failure to grant Plaintiff a hearing under its Discipline and Discharge Hearing Program was a denial of such "status" as was contemplated by the statute.

6. Plaintiff's intentional failure to list all prior employers on his application for employment with Defendant constituted a constructive fraud and it would be contrary to the basic principles of equity to require the Defendant to re-employ the Plaintiff.

7. Section 459(c) (3) of the Selective Service Act of 1967, having been enacted after the controversy in question occurred and not having been made retroactive in effect, is not applicable to the case at bar.

8. The promulgation and distribution to Plaintiff of Defendant's Discipline and Discharge Hearing Program creates a contractual relationship between the Defendant employer and his employee such as to justify Plaintiff's reliance upon the contents of such program.

9. Plaintiff's failure to adequately seek and obtain similar or comparable employment after his discharge by Defendant was a failure to properly mitigate his damages.

10. A reservist claiming rights under Section 459(g) (4) of the Selective Service Act, whose employment performance did not meet the standards of his employer and who intentionally falsified his application for employment with his employer,

is not entitled to reinstatement to his position of employment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 12, 1970.

A. ANDREW HAUK
United States District Judge

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JUDGMENT

In the United States District Court for the Central District of California.

Civil Action No. 69-944-AAH.

WALTER L. LARSEN, JR., Plaintiff, vs. AIR CALIFORNIA, Defendant.

[Lodged April 30, 1970
Filed May 12, 1970
Entered May 19, 1970]

This action came on for trial before the court, Honorable A. Andrew Hauk, District Judge, Presiding, and the issues having been duly tried, a decision having been duly rendered in accordance with the Decision, Findings of Fact, and Conclusions of Law filed herein,

IT IS ORDERED AND ADJUDGED,

1. The Plaintiff's claim for re-employment is denied.

2. The Plaintiff shall recover of the Defendant the sum of $2,250.00.

3. Each party to this action shall bear his own fees and court costs incurred in conjunction with this action.

DATED: May 12, 1970.

A. ANDREW HAUK
United States District Judge

STATE OF CALIFORNIA)
)
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326A Main Street, Huntington Beach, California 92648, that on AUGUST 14, 1972, I served the within BRIEF OF RESPONDENT on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

3 COPIES:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543

2 COPIES:

Walter L. Larsen, Jr.
P. O. Box 6212
Seattle, Washington 98188

(PETITIONER)

I declare under penalty of perjury that the foregoing is true and correct.

executed on AUGUST 14th, 1972, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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